JAMES L. MEEDER (BAR NO. 62114)
KAMRAN JAVANDEL (BAR NO. 272900)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
Phone: (415) 837-1515
Fax: (415) 837-1516
E-Mail: jmeeder@allenmatkins.com

EMILY L. MURRAY (BAR NO. 223815)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
515 South Figueroa Street, Ninth Floor
Los Angeles, California 90071-3309
Phone: (213) 622-5555
Fax: (213) 620-8816
E-Mail: emurray@allenmatkins.com

Attorneys for Defendant
HVI CAT CANYON, INC., f/k/a GREKA OIL & GAS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA and PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* CALIFORNIA DEPARTMENT OF FISH AND GAME and CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION,

Plaintiffs,

vs.

HVI CAT CANYON, INC., f/d/a GREKA OIL & GAS, INC.,

Defendant.

Case No. CV 11-05097 FMO (RZx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HVI CAT CANYON, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: October 23, 2014
Time: 10:00 a.m.
Ctrm: 22 - 5th Floor
Judge: Hon. Fernando M. Olguin

Complaint Filed: June 17, 2011

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I. Introduction

This action was filed on June 17, 2011, by three plaintiffs: the United States of America ("US"), the California Department of Fish & Wildlife ("CDFW"), and the California Regional Water Quality Control Board, Central Coast Region ("Regional Board"). (Collectively CDFW and the Regional Board are referred to herein as the "State" and the US and State are referred to herein as the "Plaintiffs.") In response, the sole defendant, HVI Cat Canyon, Inc. ("HVI-CC"), which owns and operates oil production and exploration facilities in Santa Maria, California, filed a Rule 12 motion to dismiss certain claims on jurisdictional grounds. (Docket # 6.) On June 12, 2012, the motion was denied. (Docket # 26.) On February 28, 2013, Plaintiffs filed a First Amended Complaint ("FAC"), containing ten Claims for Relief ("Claims"). (Docket # 56.) The US brings Claims One through Five under the federal Clean Water Act and Oil Pollution Act. The Regional Board brings Claims Six and Seven under the California Water Code, and CDFW brings Claims Eight through Ten under the California Fish and Game Code.

For most of 2013, discovery was stayed to allow the Parties, with the aid of a mediator, to resolve this action by settlement. (Docket # 59, 65, 67.) That effort failed. On January 23, 2014, the discovery stay expired. (Docket # 67.) Fact discovery closes on December 19, 2014, and expert discovery begins February 6, 2015, and closes May 22, 2015. (Docket # 77.) The trial, which will require the testimony of multiple experts, is set to commence December 7, 2015. (*Id.*)

HVI-CC seeks, by this Rule 56 motion for partial summary judgment, "to separate real and genuine issues from those that are formal or pretended, so that only the former may subject [it] to the burden of trial." *Radobenko v. Automated Equipment Corporation*, 520 F.2d 540, 544 (9th Cir. 1975).[1]

[1] Fed. R. Civ. P. 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Nisan Fire &*

II. The Motion Directed at the US Claims

A. Overview

The US alleges that, between 2005 and 2010, HVI-CC discharged oil on 12 occasions at its Santa Maria facilities in violation of: (1) Section 311(b)(3) of the Clean Water Act ("CWA"), 33 U.S.C. §1321(b)(3),[2] which prohibits the discharge of oil (First Claim); and (2) Section 1319(a), which makes it unlawful to discharge a pollutant without a permit (Second Claim). The US alleges that each discharge is a separate violation of the CWA for which it seeks: (1) unspecified civil penalties under Section 1321(b)(7); (2) unspecified injunctive relief under Section 1319(b), and (3) cost recovery of under Section 1002(a) of the Oil Pollution Act, 33 U.S.C. § 2702(a). (*See* First through Fifth Claims in the FAC.)

Section 1321(b)(3) prohibits "[t]he discharge of oil or hazardous substances … into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone ... in such quantities as may be harmful as determined by the President…." The word "oil" is defined in Section 1321(a)(1) to mean "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, refuse, and oil mixed with wastes other than dredged spoil." The terms "navigable waters of the United States" and "adjoining shorelines" are not defined in the CWA. The term "navigable waters," which appears elsewhere in the statute, is ambiguously defined in Section 1362(11) to mean "the waters of the United States, including the territorial seas."

The term "quantities which may be harmful" is defined, in pertinent part as framed by the FAC, at 40 C.F.R. § 110.3(b), as those discharges of oil that "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining

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[2] *Marine Insurance Company, LTD, et al. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). All references to "Section ___" in this Section II of this brief are to a section of the Clean Water Act codified in 33 U.S.C. § 1251 *et seq.*, unless otherwise indicated.

shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."[3] A "sheen" is defined at 40 C.F.R. § 110.1 to mean "an iridescent appearance on the surface of water." The regulation does not define the term "adjoining shorelines." Thus, to establish that HVI-CC violated Section 1321(b)(3), the US must prove that the Seven Spills involved (1) a discharge of oil as defined in Section 1321(a)(1), (2) into or upon the navigable waters of the United States or adjoining shorelines within the meaning of Section 1321(b)(3), and (3) in such quantities which "may be harmful" as defined in 40 C.F.R. § 110.3(b).

Because at the time of this motion there are factual issues, which may require expert testimony, regarding: (1) whether "produced water" is "oil" within the meaning of Section 1321(a)(1); (2) the volume of oil discharged; and (3) whether oil was discharged into or upon "navigable waters of the United States" within the meaning of Section 1321(b)(3), this motion addresses only the question of whether each of the Seven Spills involved the discharge of oil in such quantities as "may be harmful" as defined in 40 C.F.R. § 110.3(b).

Specifically, HVI-CC seeks partial judgment dismissing seven of the 12 spills ("Seven Spills") from the First Claim because the US cannot produce admissible evidence of an essential element of the alleged violation of Section 1321(b)(3), namely, that the Seven Spills caused a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

B. The Material Allegations in the FAC

1. The Three Surface Features at Issue

The US alleges that HVI-CC spilled crude oil and produced water at its Bell oil production facility: (1) on June 8, 2005, July 13, 2005, July 16, 2007, and

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[3] Under § 1321(b)(4), the President was authorized to define the term "quantities which may be harmful." By Executive Order 11735, published at 38 Fed. Reg. 21341, 21243 (August 7, 1973), the President delegated his authority under § 1321(b)(4) to the U.S. EPA, which promulgated 40 C.F.R. Part 110.

October 14, 2010, which "reached an unnamed tributary to Sisquoc Creek that runs along Palmer Road ('Palmer Road Creek') and its adjoining shorelines" (the "Four Palmer Road Spills"); (2) on August 11, 2005, which "reached Cat Canyon Creek and its adjoining shorelines" (the "Cat Canyon Spill"); and (3) on December 27, 2008, and May 1, 2009, which "reached an unnamed tributary that Plaintiffs refer to as 'Spring Canyon Tributary' and its adjoining shorelines" (the "Two Spring Canyon Spills"). (FAC ¶¶ 92, 105, 107, and 109.) (Collectively the Four Palmer Road Spills, the Cat Canyon Spill, and the Two Spring Canyon Spills are referred to herein as the "Seven Spills.")

The US further alleges that the so-called "Palmer Road Creek," Cat Canyon Creek, and the so-called "Spring Canyon Tributary" are "'navigable waters' within the meaning of Section 311(b)(3) and 502(7) of the CWA, 33 U.S.C. §§ 1321(b)(3) and 1362(7);" and that each of the Seven Spills discharged "oil into or upon the navigable waters of the United States or adjoining shorelines within the meaning of Section 311(b)(3)." (*Id.* ¶¶ 123, 124.)

With regard to the third element of Section 1321(b)(3), the focus of the present motion, the US alleges that:

(1) the Four Palmer Road Spills were "of such a quantity as to cause a film or sheen upon, or discoloration of, Palmer Road Creek or upon adjoining shorelines, or to cause a sludge or emulsion to be deposited into Palmer Road Creek or upon adjoining shorelines," (*id.* ¶¶ 93, 106);

(2) the Cat Canyon Spill "was of such a quantity as to cause a film or sheen upon, or discoloration of, Cat Canyon Creek or upon adjoining shorelines, or to cause a sludge or emulsion to be deposited into Cat Canyon Creek or upon adjoining shorelines," (*id.* ¶ 107), and

(3) the Two Spring Canyon Spills were "of such a quantity as to cause a film or sheen upon, or discoloration of, Spring Canyon Tributary or upon adjoining

shorelines, or to cause a sludge or emulsion to be deposited into Spring Canyon Tributary or upon adjoining shorelines," (*id.* ¶ 110).

2. The Other Surface Features Identified in the FAC

In the FAC, the US identifies a number of other surface features which it alleges are connected as tributaries to the so-called "Palmer Road Creek," Cat Canyon Creek, and the so-called "Spring Canyon Tributary."

Specifically, the US alleges that: (1) the so-called "Palmer Road Creek" is a "tributary to the Sisquoc Creek," which is "a tributary to Cat Canyon Creek;" (*id.* ¶ 120); (2) the so-called "Spring Canyon Tributary" is "an unnamed tributary" to "an unnamed tributary to Cat Canyon Creek that runs generally parallel to Spring Canyon Road and that Plaintiffs refer to as 'Spring Canyon Creek,'" which is a tributary to Cat Canyon Creek, (*id.*, ¶ 109); and (3) "Cat Canyon Creek" is "a tributary to the Sisquoc River," which is "a tributary to the Santa Maria River," which is "a tributary to the Santa Maria River Estuary, a traditionally navigable water that flows into the Pacific Ocean," (*id.*, ¶ 120).

The US does not allege that crude oil or produced water discharged during the Seven Spills reached any of these surface features. (FAC, *passim*.)

C. The Undisputed Material Facts

1. Relevant Facts Re Alleged Water Impacts

In its discovery responses, the US admits, with regard to the Four Palmer Road Spills, that "[a]fter reasonable inquiry, the information the United States knows or can readily obtain is insufficient to enable it to admit or deny" that the spills "did not cause a film or sheen upon, or discoloration of the surface of water in the Palmer Road Creek or cause a sludge or emulsion to be deposited beneath the surface of water in the Palmer Road Creek." (Separate Statement of Undisputed Material Facts ("SSUF") ¶¶ 1-4.)

In response to a request to admit that the so-called "Palmer Road Creek" did not contain water during the Four Palmer Road Spills, the US admits that "at the

time of [each spill], water was not flowing in that portion of Palmer Road Creek where crude oil discharged during the spill came to be located. Otherwise, after reasonable inquiry, the information the United States knows or can readily obtain is insufficient to enable it to admit or deny the Request." (*Id.* ¶¶ 5-8.)

The US makes the same admissions with regard to the Cat Canyon Spill and the Two Spring Canyon Spills. (*Id.* ¶¶ 9-14.)

Contemporaneous records generated by one or more of the Plaintiffs and/or Santa Barbara County report that at the time of the Seven Spills the so-called "Palmer Road Creek," Cat Canyon Creek, and so-called "Spring Canyon Tributary" were dry and the spills were promptly cleaned up. (*Id.* ¶¶ 15-28.)

2. Relevant Facts Re Alleged "Adjoining Shoreline" Impacts

In its discovery responses, the US admits that the so-called "Palmer Road Creek" and Cat Canyon Creek are not "traditional navigable water[s] within the meaning of 33 C.F.R. § 328(a)(1)." (SSUF ¶¶ 29-30.) With regard to the so-called "Spring Canyon Tributary," the US alleges in the FAC that the so-called "Spring Canyon Tributary" is "an unnamed tributary" to "an unnamed tributary to Cat Canyon Creek" (FAC, ¶ 109), which the US admits in not a traditional navigable water within the meaning of 33 C.F.R. § 328(a)(1). Section 328(a)(1) of Title 33 of the Code of Federal Regulations provides: "The term *waters of the United States* means (1) [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commence, including all waters which are subject to the ebb and flow of the tide."

Thus, the US cannot produce admissible evidence that the so-called "Palmer Road Creek," Cat Canyon Creek, or the so-called "Spring Canyon Tributary" are surface features which ever contained or could contain sufficient water (1) to render them navigable in fact, (2) to have been used in interstate or foreign commerce, or (3) to be susceptible to use in interstate or foreign commerce.

D. Argument

In order to establish the "may be harmful" element of Section 1321(b)(3), the US must prove, as required by 40 C.F.R. § 110.3(b), that each of the Seven Spills involved such a quantity of oil so as to "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."

1. The Seven Spills Did Not Impact Water

The US does not allege, nor, given the undisputed material facts could it produce admissible evidence, that each of the Seven Spills was of such a quantity as to "[c]ause a film or sheen upon or discoloration of ***the surface of the water*** … or cause a sludge or emulsion to be deposited beneath ***the surface of the water***…" as required by 40 C.F.R. § 110.3(b). (Emphasis added.) Rather, the US alleges only that the oil discharged "was of such a quantity as to cause a film or sheen upon, or discoloration of, ***Palmer Road Creek[, Cat Canyon Creek, and Spring Canyon Tributary]*** … , or to cause a sludge or emulsion to be deposited into ***Palmer Road Creek[, Cat Canyon Creek, and Spring Canyon Tributary]***…." (Section II.B.1., above, at page 4; Emphasis added.)

Such allegations are insufficient as a matter of law. The plain words of 40 C.F.R. § 110.3(b) require the discharge to have caused a film or sheen upon, discoloration of, or a sludge or emulsion to be deposited beneath ***the surface of the water***.

It is undisputed that at the time of each of the Seven Spills the so-called "Palmer Road Creek," Cat Canyon Creek, and the so-called "Spring Canyon Tributary" were dry and did not contain water. (Section II.C.1., above, at pages 5-6.) It is undisputed that the Seven Spills were promptly cleaned up. (*Id.*) And, after multiple years to investigate and discover the facts, the US admits that it does not have sufficient information to enable it to admit or deny that the Seven Spills

"did not cause a film or sheen upon, or discoloration of ***the surface of water*** in the Palmer Road Creek[, Cat Canyon Creek, or Spring Canyon Tributary] or cause a sludge or emulsion to be deposited beneath ***the surface of water*** in the Palmer Road Creek[, Cat Canyon Creek, or Spring Canyon Tributary]." (*Id.*, Emphasis added.)

Thus, the US cannot present admissible evidence that the Seven Spills discharged oil into the so-called "Palmer Road Creek," Cat Canyon Creek, or the so-called "Spring Canyon Tributary" in a quantity which may be harmful within the meaning of 40 C.F.R. § 110.3(b). Accordingly, HVI-CC is entitled to a partial judgment dismissing each of the allegations in the First Claim that the Seven Spills discharged oil into or upon the so-called "Palmer Road Creek," Cat Canyon Creek, or the so-called "Spring Canyon Tributary" in violation of Section 3121(b)(3).

2. The Seven Spills Did Not Impact "Adjoining Shorelines"

To establish that each of the Seven Spills discharged oil in a quantity that "may be harmful" to "adjoining shorelines," the US must prove at trial that: (1) the so-called "Palmer Road Creek," Cat Canyon Creek, and the so-called "Spring Canyon Tributary" are surface features which have "adjoining shorelines" within the meaning of Section 1321(b)(3); and (2) each of the Seven Spills caused a film or sheen upon or discoloration of those adjoining shorelines or cause a sludge or emulsion to be deposited upon those adjoining shorelines.

The CWA and its regulations do not define the phrase "adjoining shorelines." Nor has HVI-CC been able to locate any case law which defines the term "adjoining shorelines." Given that the phrase has no statutory definition, the following rules govern its meaning.

In the absence of a statutory definition, courts construe statutory words and terms in accordance with their ordinary, common, or natural meaning. *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning"); *Perrin v. United States*, 444 US 37, 42, 62 L.Ed.2d

199, 100 S.Ct. 311 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.")

If the ordinary, common, and natural meaning of an undefined statutory word or term is unambiguous, the maxims of statutory construction, such as *noscitur a sociis* (a word is known by the company it keeps) or *ejusdem generis* (where specific words follow general words, the specific words restrict application of the general terms to things that are similar to those enumerated), may not be applied to alter the accepted meaning. *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981) ("These maxims [*noscitur a sociis* and *ejusdem generis*] are only aids to judicial interpretation, and they will not be applied [1] when there is no ambiguity, [2] to defeat the legislative intent or purpose, [3] to make general words meaningless, or [4] to reach a conclusion inconsistent with other rules of construction."); *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519, 43 S.Ct. 428, 67 L.Ed. 778 (1923) ("Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity." … They may not be used to create doubt but only to remove doubt.")

If the legislative history of a statutory word or term suggests that Congress intended it to have a meaning different than its ordinary, common, and natural meaning, courts will consider that history. *US v. Stauffer Chemical Company*, 684 F.2d. 1174, 1183 (6th Cir. 1982) (holding that "the plain meaning of statutory language is not always decisive…. This is especially true when the legislative history suggests a different interpretation.") However, where a construction of a statutory word or phrase implicates the constitutional authority of Congress, before sanctioning such authority, "there must be present the affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490,

500-501, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979); *Solid Waste Agency of N. Cook County v. U. S. Army Corps of Engineers*, 531 U.S. 159, 172-173, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("*SWANCC*"), (Applying the *Catholic Bishop* rule, the Court invalidated the Army Corps of Engineers' "Migratory Bird Rule," which attempted, under the CWA, to regulate isolated ponds and mudflats not immediately adjacent to open waters.)[4]

With these rules in mind, we begin with the ordinary, common, and natural meaning of the term "adjoining shorelines."

(a) The Meaning of the Phrase "Adjoining Shorelines"

The ordinary and common meaning of the word "shore" is "the land bordering a usu. [usually] large body of water; specif. [specifically]: Coast." Merriam-Webster's Collegiate Dictionary (11th ed.), at 1151; Webster's Third New International Dictionary (Unabridged) (1986) (Same). The word "shoreline" means "the line where a body of water and the shore meet." *Id.* The American Heritage Dictionary, Second College Edition (1991), at 1132, defines the word "shore" as "[t]he land along the edge of an ocean, sea, lake or river," and "shoreline" as "[t]he line marking the edge of a body of water." *Id.*

Wikipedia provides this explanation of the common usage of the words "shore" and "shoreline": "A **shore** or **shoreline** is the fringe of land at the edge of a large body of water, such as an ocean, sea, or lake…. In contrast to a coast, a shore can boarder any body of water, while the coast must boarder an ocean; that is the coast is a type of shore. The word shore is often substituted for coast where oceanic shore is meant." http:en.wikipedia.org/wiki/Shoreline. The word "adjoining" is defined as "touching or bordering at a point or line." Merriam-Webster's Collegiate

[4] In *SWANCC*, 531 U.S. at 173, the Court relied on *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), which relied on *Catholic Bishop*.

Dictionary *supra*, at 16; Webster's Third New International Dictionary, *supra*, (Same); and American Heritage Dictionary, *supra*, (Same).

In short, the ordinary and common meaning of the phrase "adjoining shorelines" is that fringe of land at the edge of a large body of water, such as an ocean, sea, lake, or river.

There is no suggestion in the referenced definitions of the words "shore," "shoreline," or "adjoining" that the phrase "adjoining shorelines" ordinarily or naturally means, or is commonly used to refer to, ephemeral, unnamed "tributaries" of unnamed "tributaries," or ephemeral creeks, like the so-called "Palmer Road Creek," Cat Canyon Creek, or the so-called "Spring Canyon Tributary." Such surface features are ubiquitous on the land within the United States. They are found in virtually every field, meadow, hill, and mountain, as well as along most roads. The land immediately adjoining such features is not ordinarily, commonly, or naturally, if ever, referred to as the "adjoining shoreline" of those features.

Given the ordinary, common, and natural meaning of the phrase "adjoining shorelines," which is unambiguous, there no need, nor would it be appropriate, to resort to maxims of statutory construction such as *noscitur a sociis* and *ejusdem generis* to alter its meaning. *Donovan,* 666 F.2d at 327; *Russell Motor Car Co.*, 261 U.S. at 519. Thus, as used in Section 1321(b)(3) and 40 C.F.R. § 110.3(b), the term "adjoining shorelines" means that fringe of land at the edge of a large body of water, such as an ocean, sea, lake, or river.

(b) The Legislative History of "Adjoining Shorelines"

As set forth immediately below, there is nothing in the legislative history of the phrase "adjoining shorelines" in Section 1321(b)(3) to suggest that Congress intended the phrase to have a meaning other than its ordinary, common, and natural meaning.

(i) Its Original Use (1966-1970)

The federal prohibition against the discharge of oil to "adjoining shorelines" first appeared in the Clean Water Restoration Act, Pub. Law No. 89-753, 80 Stat. 1246, 1253 (1966) (the "CWRA of 1966"). Section 211 of the CWRA of 1966 amended Section 3 of the Oil Pollution Act of 1924 (Pub. L. No. 288, 43 Stat. 604), to make it unlawful for "any person to discharge, or permit the discharge from any boat or vessel of oil by any method, means or manner into or upon the navigable waters of the United States, and ***adjoining shorelines of the United States."*** 80 Stat. at 1253 (emphasis added). In 1966, Congress defined the term "navigable waters of the United States" to mean "all portions of the sea within the territorial jurisdiction of the United States, and all inland waters navigable in fact." *Id.*

There is nothing in the text of this statute or its legislative history to suggest that Congress, when it used the phrase "adjoining shorelines," intended that phrase to have a meaning other than its common, ordinary, and natural meaning.

(ii) Its Current Use (1970-Present)

In 1970, with its passage of the Water Quality Improvement Act of 1970 ("WQIA of 1970"), Pub. L. No. 91-224, 84 Stat. 91, Congress created the modern, comprehensive, federal statutory prohibition against the discharge of oil, now codified in Section 1321. Specifically, Section 102 of the WQIA of 1970, 84 Stat. at 91-98, added new Sections 11 through 16 to the Federal Water Pollution Control Act ("FWPCA") to "deal[] solely with the control of pollution by oil." H.R. Rep. No. 91-940, at 37 (1970) (Conf. Rep.). In language virtually identical to Section 1321(b)(3), the new Section 11(b)(2) of the FWPCA prohibited, "[t]he discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined

by the President…." 84 Stat. at 92.[5] The phrase "adjoining shorelines" was not defined, nor does the legislative history of the WQIA of 1970 address its meaning.

An August 7, 1969 Senate Report on the WQIA of 1970, explains, however, that the purpose of the legislation was to prevent future oil spills into coastal waters that had ruined ***beaches*** and threatened ***shore waters***, two obvious features of land at the edge of an ocean or sea. S. Rep. No. 91-351, at 3 and 6 (1969).[6] In his conference report to the Senate, Senator Muskie, one of the sponsors of the bill, also explained that it was the intention of the conferees that the undefined phrase "navigable waters of the United States" be broadly construed to include "all water bodies, such as lakes, streams, and rivers regarded as public navigable in law which are navigable in fact" and all such waters that serve as a transportation link in the chain of commerce. 116 Cong. Rec. 8983, 8985 (1970)[7]

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[5] In 1978, Congress amended the "in harmful quantities" language to read "in such quantities as may be harmful as determined by the President." Pub. L. No. 95-576, 92 Stat. 2467, 2468 (1978).

[6] Specifically, the relevant passage provides: "Frequent oil spills from vessels and from on- and off-shore facilities have ruined ***beaches*** and lowered the quality of our rivers and ***shore waters*** and have jeopardized animal and vegetable life. The spills from the *Torrey Canyon* and the *Ocean Eagle* have been spectacular examples of this danger…. This legislation recognizes the greater need to protect the public against disastrous oil spills such as the continuing oil leak off ***the coast*** of California at Santa Barbara. Senate action in 1967 followed the *Torrey Canyon* incident…. Since that time the *Ocean Eagle* which broke up on San Juan Harbor involved cleanup costs of approximately $700,000…. The committee recognizes that fortunately there has been no discharge of oil from a vessel, affecting the coastal waters of the United States, which approaches the liabilities imposed by this bill." (Emphasis added.)

[7] The relevant passage provides: "It is intended that the term include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce." Following his conference report, Senator Muskie asked for and received the unanimous consent of the Senate that his remarks, along with the statement of the managers on the part of the House which had been placed in the record, "reflect the intent of the conference agreement." *Id.*

Nothing in the legislative history of the WQIA of 1970 suggests that Congress intended that the phrase "adjoining shorelines" should have a meaning other than its ordinary, common, and natural meaning.

With passage of the FWPCA Amendments of 1972 (Pub. L. No. 92-500, 86 Stat. 816), Congress enacted what is now known as the modern Clean Water Act ("CWA") with its two seminal provisions, Section 1311 and 1321. Again, the phrase "adjoining shorelines" was not defined.

Section 301 of the FWPCA Amendments of 1972, codified as Section 1311, created today's comprehensive national pollution discharge elimination system ("NPDES") which, with all its complexities, regulates the discharge of pollutants to "navigable waters" by permit.[8] Under the NPDES program, the "discharge of a pollutant" is defined in Section 1362(7) as "the addition of any pollutant to navigable waters from any point source." Section 1362(7) ambiguously defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." The new NPDES permit provisions in the CWA did not contain any provision regulating the discharge of pollutants to "adjoining shorelines."

Section 311 of the FWPCA Amendments of 1972, now codified as Section 1321, reenacted without material change the oil discharge prohibition provisions Congress adopted two years earlier as Section 11 of the FWPCA. *Compare* Section 11 of the FWPCA (Pub. L. No. 910224, § 11, 84 Stat. 91, 91-98) with Section 311 of FWPCA Amendments of 1972 (Pub. L. No. 92-500, § 311, 86 Stat. 816, 844-846).

The legislative history of Section 311 of the FWPCA Amendment of 1972 confirms that this was Congress' intent.[9] On September 28, 1972, after the Senate

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[8] At the core of the NPDES permit program is Section 1311(a), which provides in a single sentence that: "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

[9] *See* S. Rep. No. 92-414, at 65-66 (1971) (explaining that under Senate Bill 2770 the oil discharge prohibition in Section 11 of FWPCA, enacted in 1970, would be

and the House passed different versions of the proposed amendments to the FWPCA, the Senate's Conference Report recommended that both houses adopt the Senate Bill, S. 2770, with minor modifications, explaining that the new Section 311 of the FWPCA would simply reenact existing law with one change: "*Senate bill* Section 311 which deals with oil and hazardous substances liability is basically the same as existing law. The section is modified, however, to add liability for the cleanup of any hazardous material discharged into navigable waters.... *House amendment* Section 311 is basically the same as existing law with respect to oil spills, but adds new provisions for hazardous substances." S. Rep. No. 92-1236, at 132-133 (1972) (Conf. Rep.). On this issue, the US agrees.[10] Nor could it disagree. It is a well settled rule of statutory construction that next to the statute itself, a conference report is the most persuasive evidence of Congressional intent for enacting a statute.[11]

Like the legislative history of the WQIA of 1970, the legislative history of Section 311 of the FWPCA Amendments of 1972 contains no suggestion, let alone,

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reenacted with the addition of a prohibition against the discharge of hazardous substances); and H.R. Rep. No. 92-911, at 117 (1972) (explaining that the proposed new "Section 311 ... closely follows existing section 11 [of the FWPCA enacted in 1970] with respect to oil spills. New provisions for hazardous substances have been added").

[10] On October 11, 1972, two weeks after the Senate's September 28 Conference Report (92-1236) was published, U.S. EPA Administrator Ruckelshaus wrote, on behalf of the U.S. EPA, a letter to the Office of Management recommending presidential approval of the FWPCA Amendments of 1972 Act. (U.S. EPA Letter, October 11, 1972, *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1, at 143-158.) In that letter, US EPA confirmed its understanding that, with regard oil discharge prohibition, the FWPCA Amendments of 1972, that had passed the House and Senate, did not change the existing law governing the discharge of oil: "[t]he existing law with respect to pollution from oil discharges is generally continued. Similar provisions of regulation and enforcement as the imposition of financial liability are extended to hazardous substances as well." *Id.*

[11] *Demby .v Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) ("Because the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent"); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir. 1986) (Inasmuch as the conference report represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent behind the enactment of a statute").

a clear expression, that Congress intended the phrase "adjoining shorelines" to have a meaning other than its ordinary, common, and natural meaning. Nor is there anything in its legislative history that suggests Congress intended the term "adjoining shorelines," and thus the jurisdiction of the CWA, to include that fringe of land immediately adjacent to the so-called "Palmer Road Creek," Cat Canyon Creek, or the so-called "Spring Canyon Tributary," which the US admits, are not surface features which have contained or could contain sufficient water (1) to render them navigable in fact, (2) to be used in interstate or foreign commerce, or (3) to be susceptible to use in interstate or foreign commerce.

It necessarily follows that the US cannot present admissible evidence that the Seven Spills discharged oil upon "adjoining shorelines" within the meaning of Section 1321(b)(3) and 40 C.F.R. § 110.3(b). Accordingly, HVI-CC is entitled to a partial judgment dismissing each of the allegations in the First Claim that the Seven Spills discharged oil upon the "adjoining shorelines" of the so-called "Palmer Road Creek," Cat Canyon Creek, and the so-called "Spring Canyon Tributary" in violation of Section 3121(b)(3).

III. The Motion Directed at the Regional Board Claims

A. Overview

HVI-CC also seeks to narrow the issues for expert discovery and trial with respect to the Sixth and Seventh Claims brought by the Regional Board. With regard to the Sixth Claim, HVI-CC seeks a partial judgment dismissing six of the 17 alleged spills at issue in the Sixth Claim on the ground that the Regional Board cannot produce admissible evidence that those six spills discharged oil and produced water into the "waters of the State," an essential element of the alleged violations of California Water Code ("CWC") section 13350(a).[12] With regard to the Seventh Claim, HVI-CC seeks a judgment dismissing all claims for volume-based penalties

[12] All references to "CWC Section ___ " in this Section III of this brief are to a section of the California Water Code, unless otherwise indicated.

for all eight spills at issue in the Seventh Claim on the ground that the Plaintiffs (the US and the CDFW), which were responsible for overseeing the cleanup of each spill, confirmed, shortly after each spill, in writing that no further cleanup was required. Finally, HVI-CC seeks dismissal of the March 3, 2008, U-Cal spill from the Seventh Claim based upon the Regional Board's admission that it does not contend that the spill violated CWC Section 13385.

B. The Material Allegations in the FAC

The Regional Board alleges that HVI-CC spilled crude oil and produced water on 17 separate occasions at its oil production facilities located in Santa Maria, California. (FAC ¶¶ 68-71, 76-82, 84, 90-99, 104-111, 116-124, 138-143.) Under its Sixth Claim, the Regional Board seeks civil penalties for violation of CWC Section 13350(a) with respect to each of the 17 alleged spills. (*Id.* ¶¶ 207-209.) Under its Seventh Claim, the Regional Board seeks, in the alternative to its CWC Section 13350 claim, civil penalties for violation of CWC Section 13385(a)(5) on both a per diem and volumetric basis with respect to eight of the 17 alleged spills. (*Id.* ¶¶ 210-212.)

C. The Undisputed Material Facts

Six of the 17 alleged spills for which the Regional Board seeks a civil penalty under CWC Section 13350(a), in its Sixth Claim, were dry and promptly cleaned up: (1) June 8, 2007, Bradley 3-Island; (2) July 16, 2007, Bell; (3) December 27, 2008, Bell; (4) May 1, 2009, Bell; (5) July 2, 2009, Bell; and (6) October 14, 2010, Bell (the "Six 13350 Spills"). (SSUF ¶¶ 31-40.) Contemporaneous records generated by one or more of the Plaintiffs and/or Santa Barbara County report that, at the time of each of the Six 13350 Spills, the surface features impacted were dry and the spills were promptly cleaned up. (*Id.*)

Under its Seventh Claim, the Regional Board seeks volume-based penalties under CWC Section 13385(b)(1)(B) for eight alleged spills: (1) July 16, 2007, Bell; (2) December 7, 2007, Bell; (3) January 5, 2008, Zaca/Davis; (4) January 29, 2008,

Bell; (5) December 27, 2008, Bell; (6) May 1, 2009, Bell; (7) October 14, 2010, Bell; and (8) December 21, 2010, Bell (the "13385 Spills").[13] (FAC ¶¶ 210-212.) For each of the 13385 Spills, one of more of the Plaintiffs confirmed contemporaneously that no further cleanup was required. (SSUF ¶¶ 42, 44, 46-47, 49-50, 52, 54, 56, 58.) Each cleanup confirmation was without qualification or limitation. (*Id.*) Nor can the Regional Board produce any admissible evidence that following each cleanup confirmation, any federal, state, or local agency requested, required, or ordered HVI-CC to undertake any further cleanup activities. (*Id.* ¶¶ 43, 45, 48, 51, 53, 55, 57, 59.)

D. Argument

1. The Six 13350 Spills Should be Dismissed Because They Did Not Involve a Discharge to "Surface Water or Groundwater"

To establish a violation of CWC Section 13350(a), the Regional Board must prove at trial that HVI-CC: (1) discharged; (2) waste; (3) to waters of the State. CWC Section 13350(a) provides: "A person who … causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the ***waters of the state***, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed…" (Emphasis added.) The term "waters of the state" is defined in CWC Section 13050(e) as "any ***surface water or groundwater***, including saline waters, within the boundaries of the state." (Emphasis added.)

There are no reported cases that discuss the scope or meaning of the term "waters of the state" as defined in CWC Section 13050(e) as "any surface or

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[13] In the FAC, the Regional Board claimed that March 3, 2008, U-Cal spill violated CWC Section 13385 (FAC ¶¶ 142, 211), however, in its responses to HVI-CC Requests for Admissions, the Regional Board admitted that the Regional Board does not contend that the March 3, 2008, U-Cal spill violated CWC Section 13385. (SSUF ¶ 41.) Thus, although not included in the list of "13385 Spills," HVI-CC nevertheless seeks its dismissal from the Seventh Claim consistent with the Regional Board's admission.

groundwater." As noted in Section II.D.2, above, in the absence of a statutory definition, courts construe statutory words and terms in accordance with their ordinary, common, or natural meaning. *FDIC v. Meyer, supra*, 510 U.S. at 476, 114 S.Ct. 996, 127 L.Ed.2d 308; *Hunt v. Superior Court* (1999), 21 Cal.4th 984, 1000 (same). If there is no ambiguity in meaning of the words, courts should presume that "the Legislature meant what it said," and go no further. *Hunt, supra,* 21 Cal.4th at 1000.

Here, the meaning of the statutory words "water" and "groundwater" are unambiguous. The plain meaning of "water" is "the liquid that descends from the clouds as rain, forms streams, lakes, and seas…." Merriam-Webster's Collegiate Dictionary (10th ed. 1999). The term "groundwater" means "water within the earth that supplies wells and springs." *Id.* Thus, under the plain meaning of CWC Section 13350(a)(3), waste discharged onto dry soil, or into a dry ephemeral streambed, does not involve the deposit of waste into the "waters of the state."[14]

Here, it is undisputed that the Six 13350 Spills did not involve the discharge of waste to surface water or groundwater because at the time of each of the Six 13350 Spills the surface features impacted were dry and the spills were promptly cleaned up. (SSUF ¶¶ 31-40.) Accordingly, the Regional Board cannot produce admissible evidence that any of the Six 13350 Spills involved a discharge charge in violation of CWC Section 13350(a) and HVI-CC is entitled to a judgment dismissing the Six 13350 Spills from the Regional Board's Sixth Claim.

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[14] CWC Section 13350(a)(3) makes only the act of "depositing" of oil into water punishable, not the mere threat of oil eventually reaching or affecting waters of the state. By way of comparison, CWC Section 13304 makes actionable the discharge of waste that "creates, or threatens to create, a condition of pollution or nuisance." Similar language regarding the "threat" of deposits into waters of the state is absent from CWC Section 13350. The conspicuous absence such language demonstrates the Legislature's intent to punish only the actual depositing of oil into waters. Therefore, even if an oil spill onto dry soil could be said to create a "threat" to waters of the state, it would not be actionable under CWC Section 13350.

2. The Regional Board's Volume-Based Penalty Claims in the Seventh Claim Should be Dismissed Because Each the Section 13385 Spills Was Cleaned Up

Under its Seventh Claim, the Regional Board seeks for each of the Eight Section 13385 Spills, in the alternative to its CWC Section 13350 claim,[15] volumetric-based civil penalties under CWC Section 13385(b)(1)(B)). (FAC ¶¶ 210-212.) CWC Section 13385(b)(1) provides:

> Civil liability may be imposed by the superior court in an amount not to exceed the sum of both of the following:
>
> (A) Twenty-five thousand dollars ($25,000) for each day in which the violation occurs.
>
> (B) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed twenty-five dollars ($25) multiplied by the number of gallons by which the volume discharged ***but not cleaned up*** exceeds 1,000 gallons.

(Emphasis added.) 13385(b)(1)

On the face of the statute, volume-based penalties are recoverable ***only*** for that portion of a spill that "is not susceptible to cleanup or is not cleaned up." *Id.* Here, it is undisputed that Plaintiffs US and/or CDFW confirmed, shortly after each spill, without qualification or limitation, that no further cleanup was required. (SSUF ¶¶ 42, 44, 46-47, 49-50, 52, 54, 56, 58.) Given these facts, HVI-CC is

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[15] If the Regional Board recovers civil penalties for a specific spill under CWC Section 13385 it is precluded from recovery civil penalties under CWC Section 13350. CWC Section 13385(g) ("Remedies under this section are in addition to and do not supersede or limit, any other remedies, civil or criminal, except that no liability shall be recoverable under CWC Section .... 13350 for violations for which liability is recovered under this section.")

entitled to partial judgment dismissing each of the Regional Board's volume-based claims from the Seventh Claim.

Indeed, the Regional Board is precluded in its opposition to this motion from contradicting these facts under the doctrine of equitable estoppel.

The doctrine of equitable estoppel provides that "'[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.'" *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489, quoting Cal. Evid. Code § 623. It also applies to all parties in privity with the party who made the controlling representation or promise relied upon by another party. *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.,* 568 F.Supp.2d 1152, 1168-1169 (C.D. Cal. 2008) ("'[T]he party who is to be estopped, ***or one in privity with that party***, must have asserted a fact or claim, or made a promise, that another party relied on....'") (emphasis in original), *quoting Maitland v. Univ. of Minnesota*, 43 F.3d 357, 363-64 (8th Cir. 1994).

When a party seeks equitable estoppel against a state agency, state law applies. *See Sawyer v. Sonoma County*, 719 F.2d 1001, 1006 n. 11 (9th Cir. 1983) ("This court has applied state law on the estoppel question when the party to be estoppel is a state government or a subdivision thereof."); *Ruecker v. Sommer*, 567 F. Supp. 2d 1276, 1299 (D. Or. 2008) (same). It is equally settled that State agencies like the Regional Board can be bound by the doctrine in the same manner as a private party. "[T]he doctrine of equitable estoppel may be applied against the government where justice and right require it," provided that "estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public....'". *City of Long Beach v. Mansell, supra,* 3 Cal.3d at 493 (citations omitted) (holding that tidelands residents had relied

to their detriment upon acts of city, and applying doctrine of equitable estoppel to force city to execute agreements to transfer title of tidelands).

Finally, independent of the doctrine of equitable estoppel, under California law, where a local or state agency is charged with administering a particular statute, a party may justifiably rely upon the agency's representations in enforcing the statute, even if the agency is mistaken. *See, e.g., Carter v. Smith Food King* (9th Cir. 1985) 765 F.2d 916, 924 ("[W]hen a state agency charged with administering a particular statute determines that an individual has the right to sue under that statute and so informs him, the claimant may justifiably rely on the agency's representation, even if the state agency is in error."); *Wunderlich v. State of California* (1967) 65 Cal.2d 777, 783 ("The crucial question is thus one of justified reliance. If the agency makes a '"positive and material representation as to a condition presumably within the knowledge of the government, and upon which … the plaintiffs had a right to rely"' the agency is deemed to have warranted such facts … [Citation.]").

Here, the Regional Board is estopped in this litigation from contradicting the contemporaneous written statements of its Co-Plaintiffs, CDFW and the US, that no further cleanup was required. The Regional Board, which did not respond to any of the spills, is in privity, as evidenced by this action, with CDFW and/or the US, the agencies charged by law with overseeing the cleanup of the spills. *See* Cal. Gov Code §§ 8670.4, *et seq*. (chief deputy director of CDFW shall be administrator responsible for oil spill response); 40 C.F.R. §§ 300.110, *et seq*. (EPA representative shall be chair of team responding to inland oil spills). CDFW and/or the US confirmed for each of the 13385 Spills that the cleanup was complete. (SSUF ¶¶ 42, 44, 46-47, 49-50, 52, 54, 56, 58.) Given the actions of the agencies responsible for overseeing the cleanups of the Eight 13385 Spills, coupled with the absence of any contemporaneous objection by the Regional Board, HVI-CC was entitled to justifiably rely upon these actions and justifiably assume that it need not undertake

any further cleanup efforts to avoid volume-based penalties under CWC Section 13385(b)(1)(B).

Moreover, given the undisputed facts, application of the doctrine of equitable estoppel to prevent the Regional Board from, in opposition to this motion, contradicting its Co-Plaintiffs, does not nullify any rule or policy adopted for the benefit of the public. If the Regional Board were allowed to contradict its Co-Plaintiffs in this litigation, multiple years after CDFW and/or the US confirmed that no further cleanup was required, the authority of these agencies would be fundamentally undermined and those responsible for the spills and their cleanup would no longer have the finality provided by those agencies regarding their cleanup actions. Indeed, California law affirmatively provides that HVI-CC is entitled to justifiably rely upon the statements of CDFW and the US. *Carter, supra*; and *Wunderlich, supra.*

Accordingly, HVI-CC is entitled to an order dismissing all claims for volumetric penalties from the Regional Board's Seventh Claim in the FAC.

IV. Conclusion

For all the foregoing reasons, HVI-CC respectfully requests that this Court enter partial judgment dismissing the Seven Spills from the First Claim brought by the US, the Six 13350 Spills from the Sixth Claim brought by the Regional Board, all volumetric penalties claims from the Seventh Claim brought by the Regional Board, and the March 3, 2008, U-Cal spill from the Seventh Claim.

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ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
JAMES L. MEEDER

By: */s/ James L. Meeder*
JAMES L. MEEDER
Attorneys for Defendant
HVI CAT CANYON, INC., f/k/a GREKA OIL & GAS, INC.